

OPINION
46-154

January 19, 1946 (OPINION)

INTOXICATING LIQUOR

RE: Separation From Other Business Establishments

This will acknowledge your letter of January 12, 1946, advising that on January 7, 1946, the city council passed and enacted Ordinance No. 8 which amended and reenacted the old ordinance covering the opening and closing hours for the sale of beer, alcohol, and alcoholic beverages. The new ordinance fixes the closing hours from 11 o'clock p.m. to 8 o'clock a.m., on week days, and from 11 o'clock p.m. on Saturday to 8 o'clock a.m., on the following Monday morning.

I note from your letter that one of the liquor dealers of your city contends that the license that he purchased from the city constitutes a contract with the city to transact business during the hours that were specified in the old ordinance, and that the city has no right to shorten these hours under such contract.

In 37 C.J., page 168, paragraph (4), we find the following:

A license is merely a permit or privilege to do what otherwise would be unlawful, and is not a contract between the authority, federal, state, or municipal, granting it and the person to whom it is granted;....."

In one of the cases cited in Note 21, referred to: William H. Stone v. Harry Fritts, 82 N.E. 792, 15 L.R.A. (N.S.) 1147, we find the following language:

A license has none of the elements of a contract, and does not confer an absolute right, but only a personal privilege to be exercised under existing restrictions, and such as my thereafter be reasonably imposed. Statutes authorizing the issuance of such licenses are enacted to promote the good order and welfare of the state, and may ordinarily be repealed at the pleasure of the Legislature." Calder v. Kurby, 5 Gray, 597; Freleigh v. State, 8 Mo. 606; People ex rel. Davies v. Tax & A. Comrs. 47 N.Y. 501; State v. Burgoyne, 7 Lea, 173, 40 Am. Rep. 69.

We do not believe that the license issued to the liquor dealer mentioned in your letter confers any contractual rights, and that the city may under the general police power amend the ordinance as to closing hours, and that such new ordinance is effective as to all licensees engaged in the liquor business in the city of Rugby.

For your information I enclose a copy of an opinion that was given from this office on January 9, 1945, prior to the enactment of chapter 50 of the 1945 Session Laws.

Chapter 49 of the 1945 Session Laws is the first enactment fixing the

closing hours of licensed liquor establishments from 1 o'clock a.m., to 8 o'clock a.m.

Section 15 of chapter 50 of the 1945 Session Laws states:

The provisions of this act shall not be construed as exclusive and shall in no manner repeal or abolish any restrictions or regulations now contained in any law, resolution or ordinance for the conduct and operation of such business enacted by the legislative assembly and the governing board of any city, village or county."

This section indicates that there was no intent by the Legislature in the enactment of this chapter to encroach upon the regulative authority of the cities concerning liquor licenses.

A part of section 5 of chapter 50 of the 1945 Session Laws reads as follows:

The provisions of this act shall not be construed as exclusive and shall in no manner repeal or abolish any restrictions or regulations now contained in or hereafter provided by law or ordinances for the conduct and operation of such business."

While chapter 50 does not deal with closing hours, still we believe that the above quoted portions indicate that the Legislature had no intent to encroach upon the rights of cities or municipalities to regulate liquor by the state legislation that was enacted in 1945. The case of Thielen v. Kostelecky, 69 N.D. 410, 287 N.W., 513, deals with the power of municipal corporations to regulate the liquor traffic. While the case does not touch upon the specific point involved, it does indicate that the court is inclined to give wide latitude and considerable discretion to the municipalities in the regulation of the liquor traffic.

It is, therefore, our opinion that notwithstanding chapter 49 of the 1945 Session Laws, a municipality, in the exercise of its regulatory power to deal with liquor traffic within its borders, may impose by ordinance closing hours that are different from those set by the state statutes, but that a municipality could not extend the closing hours beyond the hours of from 1 o'clock a.m. to 8 o'clock a.m.; as provided by the state statutes. In other words, we believe that a municipality can set a closing hour governing liquor establishments earlier than 1 o'clock a.m., and that your new ordinance setting the closing hour at 11 o'clock p.m., both on week days and Saturday, is a valid ordinance.

Under section 4 of chapter 50 of the 1945 Session Laws, persons under the age of twenty-one years may patronize a restaurant which is a part of a licensed liquor establishment, if the dining room where food is served is separated by a solid wall or walls from the room or rooms containing the bar, and access between such dining room and such bar is had by not to exceed two connecting archways or doorways of not to exceed four feet in width. Where a restaurant is operated by a liquor business, his license covers each room and he may sell beer, alcohol, and alcoholic beverages to patrons of the restaurant.

It is true that the partition provision of section 4 does not apply unless the licensee sells beer, alcohol, and alcoholic beverages over a bar. We believe that if in the particular instance you cite the licensee has not complied with the law as to partition, he should be made to do so. It appears to me that under no circumstance could a proprietor be justified in allowing persons under twenty-one years of age to overflow into his main bar if beer, alcohol, and alcoholic beverages were sold or distributed over a bar therein.

I am not passing upon the amendment of your ordinance as it pertains to section 4 of chapter 50 of the 1945 Session Laws.

It is the opinion of this office that in no sense did the liquor dealer you refer to have a contract with the city under his liquor license and that the city has the right to amend its ordinance at any time fixing any closing hour that it sees fit, as long as the same does not go beyond 1 o'clock a.m.

NELS G. JOHNSON

Attorney General